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No. 86-1745

In The

Supreme Court of the United States

OCTOBER TERM, 1986

FRANKLIN AND JULIA MOORE,
individually and as representatives of a class,
Petitioners,

v.

EARLE R. FROST, JR. AND BROWNFIELD, BOWEN, BALLY & STURTZ,
Respondents.

PETITIONERS' REPLY BRIEF

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I. BY MAKING FINDINGS OF FACT ON APPEAL TO SET ASIDE A JURY VERDICT WITH A REASONABLE EVIDENTIARY BASIS, THE SIXTH CIRCUIT CONTRADICTED THE HOLDINGS OF OTHER CIRCUITS AND THIS COURT.

In their Brief in Opposition, Respondents attempt to persuade this Court that "[a]s conceded in petitioners' brief, the Sixth Circuit applied the proper standard for review in determining whether there was sufficient evidence to create a jury issue." The Petition for Writ of Certiorari, however, makes it clear that while the Sixth Circuit may have quoted the correct standard of review, it certainly did not apply that standard. (*See*, Petition for Writ of Certiorari, at pp. 9-10).

Instead, the Sixth Circuit incorrectly determined that the standard of review permitted an appellate court to make its own findings of fact to set aside a jury verdict that had a reasonable evidentiary basis. Indeed, the Petition for Writ of Certiorari lists the numerous findings made by the Sixth Circuit in contradiction of the evidence presented at trial. (*See*, Petition for Writ of Certiorari, at pp. 7-9).

By making its own findings, the Sixth Circuit misapplied the standard of appellate review and contradicted the decisions of other circuits and this Court. Specifically, the Sixth Circuit failed to follow this Court's admonition in *Lavender vs. Kurn*, 327 U.S. 645, 653 (1946) that "where, as here, there is an evidentiary basis for the jury's verdict . . . the appellate court's function is exhausted, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable." See also, Lavender vs. Kurn, 327 U.S. 645 (1946); *Tennant vs. Peoria & Perkin Union R.R. Co.*, 321 U.S. 29 (1944); *Rogers vs. Missouri Pacific R.R. Co.*, 352 U.S. 500 (1957); *Tiller vs. Atlantic Coast Line R.R. Co.*, 318 U.S. 54 (1943); *Atlantic & Golf Stevedores, Inc. vs. Ellerman Lines, Ltd.*, 369 U.S. 355 (1952); *Wratchford vs. S. J. Groves & Sons Co.*, 405 F.2d 1061 (4th Cir. 1969); *Continental Can Co. vs. Horton*, 250 F.2d 637 (8th Cir. 1957).

The true issue presented by this Petition is whether this Court's decisions in *Lavender* and other FELA cases should apply in non-FELA actions. As demonstrated by the split among the commentators and circuits, as well as within the Sixth Circuit itself, this is an issue in dire need of this Court's attention. *See*,

e.g., 9 C. WRIGHT & A. MILLER, *Federal Practice and Procedure* §2526 (1971) ("A decision by the Supreme Court, clearly stating which view it takes as to the scope of the FELA and Jones Act decisions would be of helpful guidance to the lower federal courts.")

II. THE LOWER COURTS AND THE SECURITIES BAR NEED THIS COURT'S GUIDANCE IN AN IMPORTANT QUESTION OF FIRST IMPRESSION UNDER THE FEDERAL SECURITIES LAWS: DOES AN ATTORNEY FOR AN ISSUER OF SECURITIES HAVE A DUTY TO CORRECT MATERIAL MISSTATEMENTS OF FACTS IN OFFERING CIRCULARS HE PREPARED FOR ONGOING OFFERINGS, AFTER HE LEARNS THE STATEMENTS HE MADE ARE FALSE AND MISLEADING?

Respondents do not dispute that this case raised, for the first time in a United States Court of Appeals, the important question of whether an attorney has the duty to correct or disclose known misstatements and omissions of material fact in offering circulars he has prepared. Likewise, Respondents agree that the purpose behind the federal securities laws is to protect investors against manipulation of stock prices and to provide investors with full disclosure of material information. *See, Ernst & Ernst vs. Hochfelder*, 425 U.S. 185 (1976).

Respondents argue, however, that the Sixth Circuit legitimately substituted a new duty "to insist on compliance" for the traditional disclosure requirements of the federal securities laws. In essence, the Respondents argue that the difference between a "duty to correct or disclose" and a "duty to insist on compliance" is nothing more than semantics because a representation may be "corrected" in one of two ways: 1.) an attorney may correct a representation by modifying it to reflect the true state of affairs, or 2.) an attorney may force his client to modify its actions to comply with the representations. Respondents never bother to explain how an attorney can "force" a client to modify its actions to comply with the representations made in an offering circular.

This point is particularly relevant to the case at bar because on January 22, 1981, Mr. Frost received a list which showed that Fenex and Bethel Resources had converted $709,000 from investors' accounts and needed an additional $830,000 just to complete and equip investors' wells. DX 426; T.P., R. 194 at 745-41. On that date, the $243,750 Fenex offering Mr. Frost

registered in November was still being sold to investors. In addition, three HMW offerings, with a combined price of $275,000, were being sold to investors. PX 109.

Respondents fail to recognize that this Court's guidance is needed to maintain the paramount goal of the federal securities laws -- to provide the investors with full disclosure of material information. This goal cannot be accomplished by supplanting the traditional "duty to disclose" with an unrealistic duty "to insist on compliance."

Similarly, Respondents fail to recognize the dilemma facing a securities attorney who must choose between 1.) his duty, imposed by the American Bar Association's Code of Professional Responsibilty or Model Rules of Professional Conduct, to zealously represent his client and protect his client's confidences and secrets, and 2.) his duty, advocated by the SEC and the federal securities laws, to give primary allegiance to the investing public.

Without offering any support for their proposition, Respondents claim that the SEC's opinion in *In re: Carter,* Fed. Sec. L. Rep. (CCH) ¶ 82,175 (1979) "belies Petitioners' contentions."

Numerous commentators, however, have fully explored the holding in *Carter* and concluded that the securities attorney faces the dilemma posed in the Petition for Writ of Certiorari. In a recent New England Law Review Article, for example, Richard Kahn carefully examined the holding in *Carter* and concluded as follows:

> With the case of *In re Carter,* and the standard enunciated therein, the Commission has assumed authority to discipline attorneys as never before .... By having its own set of attorney conduct standards, the Commission is undermining the function of the local bar associations, who are responsible for maintaining the integrity of the profession .... Leaving the determination of proper rules of conduct to the local bar associations will ... alleviate any possible confusion resulting from the differing standards being imposed by more than one authoritative body. A single standard will require only a single interpretation, thus eliminating confusion as to where primary responsibilities lie.

Kahn, *Attorney Discipline by the SEC: 2(e) or not 2(e), 17* New England Law Review 1267 (1982).

Likewise, Marc J. Goldstrom painstakingly analyzed the holding in *Carter* and made a comprehensive analysis of the dilemma facing a securities attorney:

> [T]he Securities and Exchange Commission (SEC) has advocated the position that securities lawyers must assist in maintaining the honesty and integrity of the securities market, including in certain circumstances, a duty to report a client's intended or past violations to the Commission. Yet, aspects of the SEC's position are inconsistent with the provisions of the American Bar Association's Model Code of Professional Responsibility. Thus, securities attorneys face the dilemma of deciding which set of guidelines to follow. Further, by choosing one set of guidelines, the attorney may subject himself to liability for violating the other set of guidelines. The solution to this dilemma is a single set of guidelines upon which the securities bar may rely.

Goldstrom, *Secondary Liability of Attorney's for Securities Law Violations--the Need for a Single Standard of Attorney Conduct,* 30 Wayne L. Rev. 65 (1983).

By granting this Petition for Writ of Certiorari, this Court has the opportunity to assist the lower courts and the securities bar in determining whether an attorney has a duty to disclose or correct known misstatements and omissions in offering circulars he has prepared.

CONCLUSION

In this case, the Sixth Circuit scoured the record in an effort to find circumstantial evidence that conflicted with the jury's verdict. Such a standard of appellate review is clearly contrary to this Court's decision in *Lavender* and numerous other FELA cases. But the United States Courts of Appeals, including the Sixth Circuit itself, are in a state of conflict and confusion, not knowing whether this Court intended for its FELA decisions to apply in a non-FELA action.

Similarly, the lower federal courts and the securities bar need this Court's guidance in order to establish a uniform rule regarding an attorney's duty under the federal securities laws to correct known misstatements and omissions of material fact in offering circulars he has prepared.

This petition for writ of certiorari should be granted so that this Court can give its badly needed guidance on these crucial issues.

Respectfully submitted,

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